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Docket No. Ex Parte No. 711 (Sub-No. 1)

RECIPROCAL SWITCHING

INITIAL COMMENTS OF G3 ENTERPRISES, INC.

Michael F. McBride
Robin M. Rotman
Van Ness Feldman LLP
1050 Thomas Jefferson Street, N.W.
Washington D.C. 20007
202-298-1800
mfm@vnf.com
rmr@vnf.com
Attorneys for G3 Enterprises, Inc.

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I. Introduction

Pursuant to the Notice of Proposed Rulemaking issued by the Surface Transportation Board (“STB” or “Board”) on July 27, 2016¹ (and the Notice extending the procedural schedule issued on September 1, 2016), G3 Enterprises, Inc. (“G3”) hereby submits its Comments on the NOPR. G3 appreciates the opportunity to submit these Comments regarding competitive switching.²

II. Background

G3 contracts and arranges the transportation for the majority of E. & J. Gallo Winery’s products (wines and spirits) via railroad, from Modesto, California to facilities throughout North America. Operating as a logistics company, G3 pays the transportation charges assessed to ship E. & J. Gallo Winery products by various railroads and other modes of transportation, including via Union Pacific Railroad Company (“UP”) and BNSF Railway Company (“BNSF”).

In June 2001, G3 purchased a facility in Modesto, California (“G3 Facility”) from Procter & Gamble (“P&G”). The G3 Facility is directly located on a UP rail line. At the time that G3 purchased the G3 Facility, it believed, based on P&G’s representations and the then-current UP tariff, that the facility was served by two railroads—UP directly, and BNSF via reciprocal switching over the tracks of UP and the short-line railroad Modesto and Empire Traction Company (“MET”). Between 2001 and 2011, G3 invested another \$29 million in the G3 Facility, adding an additional 1.5 million square feet of warehouse space at the G3 Facility. But when G3 made inquiries with UP and BNSF for rates, UP removed P&G and the G3 Facility from its June 2011 reciprocal switching circular. And, when BNSF notified UP in February 2012 that it intended to serve the G3 Facility via reciprocal switching over UP and MET, UP issued a letter denying BNSF access to serve the G3 Facility via reciprocal switching; UP claimed that it was entitled to deny access because the G3 Facility had been sold from P&G to G3 and, as a result, UP had removed P&G from its Reciprocal Switching Circular (but only in 2011).

Accordingly, in September 2012, G3 and BNSF jointly sought relief from the STB in the form of an Amended Petition for Enforcement filed in Finance Docket No. 32760, *Union Pacific Corp., Union Pacific Railroad Co. & Missouri Pacific Railroad Co. – Control & Merger –*

¹ Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching*, 81 Fed. Reg. 51,149 (Aug. 3, 2016) (“NOPR”).

² Historically, railroads generally switched for each other, hence the term “reciprocal switching.” Following passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and in the wake of numerous railroad mergers, the term “competitive switching” is a more accurate description of the situation today, because although railroads may switch for each other on an agreed-on basis, they do so less often than in the past, and moreover, any switching directed by the STB would, as proposed, not be on a reciprocal basis—it would simply apply in the circumstances of a particular shipper who seeks competitive switching as a remedy. The NOPR uses both “reciprocal switching” and “competitive switching.” We do as well.

Southern Pacific Railroad Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., & the Denver & Rio Grande Western Railroad Co. (“G3/BNSF Amended Petition for Enforcement”). As stated in the G3/BNSF Amended Petition for Enforcement, G3 and BNSF believe that BNSF has a right to serve the G3 Facility. The basis for this belief is two-fold.

First, the STB’s merger-competition policy entitles any facility or shipper that had access to at least two Class I railroads prior to a merger to continue to have access to two Class I railroads following the merger. G3 unquestionably is entitled to access to a second railroad under that policy, because it lost access to a railroad—Southern Pacific Railroad Company (“SP”)—as a result of the UP/SP merger.

Second, in the course of the UP/SP merger proceeding, UP made numerous representations, some directly to the STB and some to private parties, indicating that rail competition would be preserved or even enhanced following the merger. Under Decision No. 44,³ UP is required to comply with all of its representations made during the merger proceeding. UP specifically represented to MET that the Modesto Switching District (i.e., the area served by MET) would not experience a reduction in rail-to-rail competition as a result of the merger. The very definition of the Modesto Switching District in UP’s Switching Tariff expressly includes the tracks serving the G3 Facility.⁴ Accordingly, G3 believes that following the UP/SP merger, UP is required to continue to allow rail-to-rail competition to the G3 Facility by allowing BNSF access to that facility via reciprocal switching or some other means.

The STB, however, refused to grant relief to G3 and BNSF. Following a hearing, in Decision No. 106,⁵ the STB determined that, because G3 was not identified as a “2-to-1” shipper in the UP-BNSF Settlement Agreement,⁶ the STB would not require UP to allow BNSF access to the G3 Facility via reciprocal switching, even though the reduction to one-carrier service at the G3 Facility was a result of UP’s actions. Decision No. 106 further held that UP’s representations, including the specific representation to MET regarding preservation of

³ *Union Pacific Corp., Union Pacific Railroad Co. & Missouri Pacific Railroad Co. – Control & Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., & the Denver & Rio Grande Western Railroad Co.*, Docket No. FD 32760, Decision No. 44, 1 S.T.B. 233 (1996), *aff’d sub nom. Western Coal Traffic League*, 169 F.3d 775 (D.C. Cir. 1999).

⁴ Br. of Pet.-Intervenor at 34, *G3 Enterprises, Inc. v. STB*, No. 15-70597 (9th Cir. June 15, 2015); Reply Br. of Pet’r at 22-24, *G3 Enterprises, Inc. v. STB*, No. 15-70597 (9th Cir. Sept. 4, 2015) (“G3 Reply Br.”).

⁵ *Union Pacific Corp., Union Pacific Railroad Co. & Missouri Pacific Railroad Co. – Control & Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., & the Denver & Rio Grande Western Railroad Co.*, Order Denying Joint Petition for Enforcement, Finance Docket No. 32760, Decision No. 106, slip op. (served Dec. 20, 2013).

⁶ See Joint Submission of Restated and Amended BNSF Settlement Agreement (Mar. 1, 2002).

competition in the Modesto Switching District, do not afford G3 any relief because G3 purchased the G3 Facility from P&G after the UP/SP merger was consummated.

G3 believes that the STB's reasoning in Decision No. 106 is misguided, not only because of its inconsistency with the STB's merger-competition policy, but also because UP's representations regarding the Modesto Switching District expressly apply to the tracks serving the G3 Facility. Accordingly, in January 2014, G3 timely filed with the STB a Petition for Reconsideration of Decision No. 106.⁷ The Petition for Reconsideration emphasized that a long line of STB decisions had implemented the merger-competition policy.

The STB denied reconsideration in Decision No. 107,⁸ for essentially the same reasons as set forth in Decision No. 106. In Decision No. 107, the STB concluded that the reduction to one-carrier service at the G3 Facility did not result from the UP/SP merger. This illogical conclusion is puzzling to G3, because, if the STB had not approved the UP/SP merger, then clearly G3 would continue to have access to UP and SP today. The STB further held in Decision No. 107 that, if a shipper facility changes ownership, UP is no longer required to uphold its representations to maintain competition at that facility. Yet this interpretation conflicts with the very definition of the Modesto Switching District, and is inconsistent with UP's representations about maintaining competition in the Modesto Switching District.

After the completion of proceedings before the STB, G3 sought judicial review of Decision Nos. 106 and 107 in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), where G3's Petition for Review was docketed in Case No. 15-70597. The case has been fully briefed and is awaiting notice of a date for oral argument. G3's arguments are fully presented in its Opening and Reply Briefs in Case No. 15-70597 ("G3 Briefs"). The STB is in possession of the G3 Briefs. G3 incorporates by reference the G3 Briefs in these comments.

G3 earnestly requests that the Board Members and the Board's Staff review the G3 Briefs. The G3 Briefs explain at length why G3 is entitled to relief in Finance Docket No. 32760, based on the STB's merger-competition policy and its decision requiring UP to adhere to all of its representations made in the context of the UP/SP merger proceeding. For the convenience of the Board, the Summary of Argument from G3's Opening Brief is excerpted here:

The STB's governing statute (the ICCTA), as interpreted by the STB in its merger-competition policy, and as implemented consistently by the STB in its decisions governing rail mergers, requires that the STB avoid any "adverse effect on competition among rail carriers in the affected region" resulting from a rail

⁷ See G3 Enterprises and BNSF Railway Petition for Reconsideration of Decision No. 106, FD 32760 (Jan. 9, 2014).

⁸ *Union Pacific Corp., Union Pacific Railroad Co. & Missouri Pacific Railroad Co. – Control & Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., & the Denver & Rio Grande Western Railroad Co.*, Order Denying Petition for Reconsideration, Finance Docket No. 32760, Decision No. 107, slip op. (served Dec. 30, 2014).

merger or acquisition. Then-49 U.S.C. § 11344(b)(1)(E) (now § 11324(b)(5)). In practice, the STB has interpreted this statutory mandate to protect against a reduction in the number of rail carriers in a region (such as Modesto) from two or more railroads prior to the merger to one railroad as a result of the merger. The STB's duty is not limited to the reduction in competition that occurs at the time of the merger, but rather (according to the STB itself) is ongoing for the "indefinite future," to protect against reductions in competition at any time in the future that would not have occurred but for the merger.

At the time of the UP/SP merger in 1996, the G3 Facility (then owned by P&G) was served directly by UP, indirectly by SP through reciprocal switching via UP, and indirectly by BNSF via reciprocal switching on UP and MET. Today, following UP's termination of BNSF's reciprocal switching access, the G3 Facility would be served by two railroads—UP and SP—but for the UP/SP merger. Therefore, to be consistent with its merger competition policy and its prior decisions, the STB should have ensured G3's access to a second strong Class I carrier after UP terminated BNSF's reciprocal switching rights to serve the G3 Facility. SP no longer exists, so, in practice, that second, strong Class I carrier can only be BNSF. Yet, the STB failed to follow its statutory mandate, its own merger-competition policy interpreting that mandate, its precedents, and its governing decision (Decision No. 44) approving the UP/SP merger, in denying G3 access to a second railroad when UP terminated BNSF's access to the G3 Facility.

Moreover, in its Decision No. 44 allowing UP and SP to merge, the STB stated (1 S.T.B. at 246 n.14, 419 n.177; E.R. 149, 171) that it would hold UP to all of the representations it made during the merger proceedings. This includes representations made to the STB and to private parties. UP represented to the STB, through its merger application and testimony of its employees and consultants, that rail competition at Modesto, at "2-to-1" and "3-to-2" points, and throughout the affected region, would be preserved or even enhanced as a result of the UP/SP merger. UP further represented, in a letter to MET, that UP had no intention of diminishing the Modesto Switching District or terminating reciprocal switching rights to P&G, the prior owner of the G3 Facility. Yet, in Decision Nos. 106 and 107, the STB failed to require UP to adhere to its representations. Therefore in those Decisions, the STB acted contrary to its own controlling Decision in Docket No. FD 32760, without reasoned explanation for its departure from precedent, by permitting UP to violate the merger conditions prescribed in Decision No. 44 and which remain in effect.

Opening Br. of Pet'r at 26-28, G3 Enterprises, Inc. v. STB, No. 15-70597 (9th Cir. June 1, 2015).

G3's Reply Brief, also incorporated by reference herein, explains that the STB's Answering Brief does not provide a valid rationale for the STB's refusal to grant relief to G3 and BNSF.

Nearly five years have passed since BNSF first sought to serve the G3 Facility; throughout this time, G3 has been denied the benefit of rail-to-rail competition at the G3 Facility. In light of how long this process has taken, and given the clear entitlement of G3 to relief, G3 is disappointed that the STB and its appellate counsel, based on the arguments presented by G3 in the Ninth Circuit, have not requested a voluntary remand from the Ninth Circuit in order to address G3's arguments, without awaiting a notice of oral argument (more than a year after appellate briefing was concluded, almost two years after reconsideration was denied, almost three years after the STB's original decision, and nearly five years after BNSF first sought to serve the G3 Facility). A voluntary remand is entirely proper under appellate procedure. It would not bind the STB to resolve the matter in favor of any particular outcome, but rather would simply require the STB to respond adequately to all of G3's arguments.

In this case, justice delayed is truly justice denied, due to the obvious inability of the STB to make G3 whole for the loss of rail-to-rail competition since February 2012.

III. G3's Comments on the Proposed Competitive-Switching Rules

If for some reason G3 does not prevail before the Ninth Circuit or on remand from the Ninth Circuit, it should have an opportunity to present a case for the G3 Facility to have indirect access to BNSF via reciprocal switching under 49 U.S.C. § 11102(c)(1).

G3 applauds the STB for recognizing that its current reciprocal switching rules do not offer shippers a meaningful opportunity to obtain reciprocal switching relief. The NOPR herein recognizes that, since 1985, “[f]ew requests for reciprocal switching have been filed with the [STB] . . . and in none of those cases has the Board granted a request for reciprocal switching.” 81 Fed. Reg. at 51,150. The NOPR admits that the “competitive abuse” test for reciprocal switching relief outside of a merger proceeding, first articulated by the STB in *Midtec Paper Co. v. Chicago & North Western Transportation Co.*, 3 I.C.C. 2d 171 (1986), *aff'd sub nom. Midtec Paper Co. v. ICC*, 857 F.2d 1487 (D.C. Cir. 1988), has “effectively operated as a bar to relief rather than as a standard under which relief could be granted.” 81 Fed. Reg. at 51,152. G3 made similar arguments in its Opening Brief (at 42) and Reply Brief (at 17).

That said, G3 believes that the STB's proposal herein is unworkable for four principal reasons. First, regarding the first prong—“practicable and in the public interest”—the STB's proposed rules apparently would require a shipper seeking relief to produce information that at least in part may only be in the possession of the railroad, potentially leading to costly and protracted discovery, or even preventing meritorious petitions from being filed in the first place. Next, the second proposed prong—“necessary to provide for competitive railroad service”—would inappropriately apply the “market dominance” test to circumstances where there is no statutory support for applying that standard. Third, the STB appears to propose a reciprocal switching fee structure that could eliminate the usefulness of the remedy of reciprocal switching, rendering this entire process irrelevant to most or all shippers and contrary to the STB's stated intentions in proposing its new rules. Fourth, both proposed prongs arbitrarily would exclude Class II and Class III carriers from reciprocal switching prescriptions, without basis in law or policy; depending on how this exclusion is interpreted, it could potentially limit G3's ability for relief under the proposed rules, because BNSF would get access to the G3 Facility over the

tracks of UP and the short-line MET. These concerns, and possible solutions, are discussed in turn below.

The STB may have suggested many of the above-described (and we believe largely unworkable) constraints contained in this proposal due to its concerns about the effect of competitive switching on the railroads' overall revenues. As discussed further below, G3 believes that the possible revenue impacts on the railroads of the rules proposed herein are irrelevant; the controlling statutes did not instruct the STB to restrict the competitive-switching remedy to only such cases where it would have a minimal effect on railroad revenues.

A. Streamlining the Proceeding by Establishing a Prima Facie Case

As to the first proposed prong—"practicable and in the public interest"—the STB has proposed a complicated, multi-pronged test that would require the shipper seeking relief to prove various facts in its opening case. 81 Fed. Reg. at 51,156 ("the availability of reciprocal switching would not be presumed based on one-size-fits-all criteria, but instead would be based on factual determinations derived from the evidence provided by the parties"). G3 believes, however, that some of the information that the shipper may be expected to produce is more likely to be in the possession of the railroad. If shippers must obtain this information from the railroads through discovery, both shippers and railroads are likely to face high legal costs and delays in resolving these proceedings. Indeed, if shippers are not permitted to prove their cases through discovery (that is, if shippers may not file petitions alleging as fact matters that the shippers may not know for certain to be true), they may in reality be entirely precluded from filing worthy cases.

G3 recommends that the STB should instead set forth a straightforward, *prima facie* test for the shipper to present in its opening case, which generally would be from information publicly available to, or in the possession of, the shipper. Such factors should include: (1) identification of the shipper's facility at which relief is sought, (2) a showing that there is or can be an interchange within a reasonable distance from the shipper's facility to reach an alternative carrier, (3) a showing that the alternative carrier can interchange with the incumbent carrier at that point of interchange, and (4) that the shipper would benefit from having access to a second carrier, either because the costs of transportation from the incumbent carrier are too high, or the service provided is not considered adequate by the shipper, or both.

At that point, the burden should shift to the incumbent carrier to show why the shipper's *prima facie* case should not permit reciprocal switching, using information publicly available or available to the railroad. If the STB subsequently concludes that the incumbent railroad has adequately rebutted the shipper's *prima facie* case, the burden would then shift back to the shipper, and the shipper would then be entitled to discovery limited to the matters put at issue by the incumbent railroad for the shipper's rebuttal.

In this manner, the amount of discovery would be minimized, the case could be streamlined and promptly presented and resolved, and even small- to medium-size shippers could have a chance to present a case for reciprocal switching, as Congress obviously intended. In contrast, if the approach proposed by the STB is adopted, only the largest shippers could afford the cost, complexity, time, and legal and consulting fees necessary to put on a meritorious

case and have a chance to prevail. In enacting 49 U.S.C. § 11102(c)(1), Congress intended that all shippers have such a remedy, not just the largest shippers, so G3's proposal would effectuate the intent of Congress, whereas the STB's proposed rules do not.

B. Inappropriate Use of Market Dominance Test

The STB's proposed second prong—"necessary to provide for competitive railroad service"—is problematic because it would apply the "market dominance" test to circumstances where there is no statutory support for applying that standard. Specifically, under this prong, a shipper would be required to prove that intermodal and intramodal competition is not effective with respect to the movements for which switching is sought. 81 Fed. Reg. at 51,156-57. The STB proposes to use the market dominance test to determine whether a movement lacks effective intermodal and intramodal competition. *Id.* at 51,158.

The STB recognizes that "market dominance is not a jurisdictional prerequisite to obtaining relief in an access proceeding under [49 U.S.C. §] 11102." *Id.* (citing *Midtec*, 3 I.C.C.2d at 180). Yet, notwithstanding the complete absence of statutory foundation, the STB proposes to use this test anyway on the basis that "there is nothing in [49 U.S.C.] § 11102 that prohibits the use of the market dominance test here as part of the analysis, rather than as a jurisdictional prerequisite." *Id.*

G3 believes that the STB should not engraft the "market dominance" test onto the right of shippers to obtain reciprocal switching when Congress chose not to do so (yet could easily have done so, as it did for rate challenges, if it so chose). Congress applied the market dominance test to complaints seeking rail rate relief, and if it had wanted to impose the requirement in the competitive-switching context, it would have done so in 49 U.S.C. § 11102. It did not, and therefore, neither should the STB. Moreover, as the recent chemical shipper rate reasonableness complaint proceedings prove, determining market dominance can be a costly and time-consuming exercise (if the railroads dispute market dominance), and would constitute yet another barrier to even seeking relief to which shippers may be entitled.

C. Competitive-Switching Fees Under the Proposed Rules Should Be Set at No More Than the Full Costs of the Incumbent Carrier over Its Segment of the Route

As an initial matter, G3 observes that UP/SP Decision No. 44 governs the methodology for determining the switching fee for facilities, such as the G3 Facility, that are required to continue to receive rail-to-rail competition following the UP/SP merger.⁹ Therefore, if G3 prevails before the Ninth Circuit or on remand from the Ninth Circuit, Decision No. 44 will dictate the applicable methodology for determining the switching fee for BNSF to serve the G3 Facility.

Because the NOPR specifically seeks comment on the appropriate fee methodology for reciprocal switching access under the proposed rules (i.e., outside of the merger context), G3 provides the following comments on the STB's proposal:

⁹ Decision No. 44 at 413-17.

In G3's experience, an incumbent carrier with direct access to a facility typically has a lower cost of serving that facility than do other carriers that lack direct access and that do not currently serve the facility. In order to allow an alternative carrier a reasonable opportunity to compete with the incumbent, as required by statute, therefore, the STB should limit the reciprocal switching charge to the variable costs of access via reciprocal switching, not full costs.

If the STB does not limit the fee of reciprocal switching access to variable costs, the fee should be set no higher than the full costs of the incumbent carrier over its own segment to provide such access. If it were set any higher than full costs, the fee itself might effectively preclude competitive switching as a viable remedy.

The Board is not required to set the fee for competitive switching at 180%, the jurisdictional floor for prescribing rates, or at some higher level, such as the 240% figure discussed by some other parties. The Board correctly determined that a surcharge is not a "rate,"¹⁰ and the same reasoning demonstrates that a switching fee is not a "rate." Accordingly, Congress did not make the STB's jurisdiction for determining the reasonableness of switching fees and other charges (such as fuel surcharges) subject to the 180% jurisdictional threshold applicable to rates, and so neither should the Board.

In no event should the STB include "opportunity costs" in the amount to be charged for access via reciprocal switching, because doing so would, in effect, negate any use of the remedy of reciprocal switching ("opportunity costs" are proposed at 81 Fed. Reg. at 51,159). It is plain that, if a shipper has to pay the incumbent all of its opportunity costs (i.e., the full amount of the return now being earned by the incumbent by directly serving the shipper), and a return to the alternative carrier sufficient to encourage it to serve the shipper, the shipper will pay substantially more than the shipper is being charged today, and that will eliminate any usefulness of the remedy of reciprocal switching. That is not what Congress intended, or presumably what the STB intends by proposing reciprocal switching rules, so the STB must reject the railroads' proposed inclusion of opportunity costs in the compensation for reciprocal switching.

D. Arbitrary Exclusion of Class II and Class III Railroads

The STB's proposal arbitrarily would exclude Class II and Class III carriers from reciprocal switching prescriptions. G3 believes that the STB should not limit the applicability of reciprocal switching prescriptions to only Class I railroads. Congress did not include such a limitation in 49 U.S.C. § 11102; that statute authorizes the STB to apply reciprocal switching remedies without regard to the class of railroad.

G3 is particularly concerned about this issue because, as explained above, in order to obtain access to BNSF, the G3 Facility would require reciprocal switching access for BNSF via UP and the short-line railroad MET. G3 does not see any legal or practical basis for limiting the ability of shippers to seek reciprocal switching access irrespective of whether they are seeking access from a Class I railroad only, from a Class II or Class III railroad only, or from a Class I

¹⁰ Ex Parte No. 661, *Rail Fuel Surcharges*, at 7 (served Jan. 26, 2007) (citing Ex Parte No. 661, *Rail Fuel Surcharges*, at 3 (served Aug. 3, 2006)).

railroad via a Class II or Class III railroad. Certainly, in circumstances such as G3's, where it would obtain access to a second Class I railroad (BNSF), over the tracks of a Class III railroad (MET), there is no basis for denying relief to G3 to which it otherwise would be entitled but for the fact that BNSF would need to obtain the ability to serve G3 in part over the tracks of a Class III railroad, MET.

E. The Revenue Impact on the Railroads Should Be Irrelevant

The STB may have included these problematic aspects in the proposal due to its concerns about the impact of the proposal on the railroads' overall revenues. *See, e.g.*, Commissioner Begeman, dissenting in part with separate expression, 81 Fed. Reg. at 51,163 (noting STB concern that two percent of railroad revenues is thought of as "significant"); Vice Chairman Miller, comment with separate expression, 81 Fed. Reg. at 51,162 (stating that the proposed rule strikes an "appropriate balance" between the rights of the shippers and need for railroads to earn "adequate revenues"). But Congress did not instruct the STB in 49 U.S.C. § 11102(c)(1) to limit the competitive-switching remedy to only such relief as would have a *de minimis* impact on railroad revenues. Rather, it instructed the STB, through the Rail Transportation Policy, 49 U.S.C. § 10101(1), "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."

Accordingly, to carry out the statute, the STB should adopt workable competitive-switching remedies. The analysis previously provided by the National Industrial Transportation League in Finance Docket No. 711 demonstrated that the revenue impact of an effective competitive-switching remedy would be small, and G3 strongly agrees with this conclusion.¹¹ As noted by Vice Chairman Miller, 81 Fed. Reg. at 51,162, shippers generally choose not to incur the cost, complexity, and delay associated with STB proceedings, but rather rely on workable STB rules to assist them in negotiating with the railroads on a level playing field. The STB can be assured that the railroads will continue to have plenty of commercial leverage, and will not enter into commercial arrangements that would not be profitable. Accordingly, all parties have incentives to arrive at reasonable commercial terms that are not likely to have a material impact on the railroads' overall revenues. In fact, by promoting effective rail-to-rail competition, the STB might foster innovative and nimble business practices that make industries more profitable, rather than less.

IV. Conclusion

As discussed in detail in the G3 Briefs (which are in the STB's possession and are incorporated herein by reference), the STB should require UP to allow BNSF to serve the G3 Facility, in accordance with the STB's merger-competition policy and UP's representations made in the course of the UP/SP merger proceeding.

In the alternative, if G3 must pursue the inferior remedy of access to BNSF via competitive switching outside the context of the UP/SP merger proceeding, then the STB should

¹¹ *See generally* Opening Submission of the National Industrial League, STB Docket No. Ex Parte No. 711 (Mar. 1, 2013).

adopt the changes to its proposed rules suggested herein, so as to make the remedy of reciprocal switching effective and available to all shippers on all railroads, as Congress intended in 49 U.S.C. § 11102(c)(1). The statute does not limit the remedy to shippers that are served by a Class I carrier, or that are subject to “market dominance” at the facility in question, or that are large enough to have the resources and information available to them to allow them to make an effective presentation under the “practical and in the public interest” prong of the STB’s proposed rules. The STB would be acting in an arbitrary and capricious manner if it chooses to impose these unfounded limitations. G3 urges the STB to instead revise its reciprocal switching rules in a manner that, consistent with the overriding purpose of the Rail Transportation Policy, 49 U.S.C. § 10101(1), promotes competition rather than regulation to the maximum extent possible.

Respectfully submitted,

/s/ Michael F. McBride

Michael F. McBride

Robin M. Rotman

Van Ness Feldman LLP

1050 Thomas Jefferson Street, N.W.

Washington D.C. 20007

202-298-1800

mfm@vnf.com

rmr@vnf.com

Attorneys for G3 Enterprises, Inc.